(1) 89-571

NO.

Supreme Court, U.S.
FILED
SEP 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the
# Supreme Court of the United States

OCTOBER TERM, 1989

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND
Petitioner,

V.

MICHAEL ANTONY PRESTI, and
LLOYD A. PIZZALOTO, SR.
Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,
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Attorney for Petitioner

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## QUESTIONS PRESENTED FOR REVIEW

1. Were THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND required to file a proof of claim to preserve their right to collect on non-dischargeable student loan owed by the debtor, MICHAEL A. PRESTI?

2. Did the debtor, MICHAEL A. PRESTI, complete all payments required by the Plan?

3. Does MICHAEL A. PRESTI still owe THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND for his student loan since he did not pay on this non-dischargeable debt in or out of the bankruptcy?

4. Should MICHAEL A. PRESTI have been required to pay THE ADMINISTRATORS OF THE TULANE EDUCATION FUND in his Chapter 13 Bankruptcy?

5. Can THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND collect from MICHAEL A. PRESTI the debt owed for his student loan outside of the bankruptcy?

6. Should nondischargeable debts, which Congress intended to receive preferential treatment, and full repayment, be allowed to be discharged without being repaid?

## LIST OF PARTIES

Petitioner: The Administrators of the Tulane Educational Fund - creditor/original plaintiff/appellant:

Respondents: Michael A. Presti - debtor/defendant/appellee; and Lloyd A. Pizzaloto, Sr., - Trustee/Appellee

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## GROUNDS FOR JURISDICTION

This matter arises from an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Louisiana. The decision of the said Bankruptcy Court, dated April 14, 1988, was appealed to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C., Section 138(A).

The District Court upheld the decision of the Bankruptcy Court in its judgment dated November 25, 1989. An appeal of this judgment was taken to the United States Court of Appeal for the 5th Circuit, pursuant to 28 U.S.C., Section 1291.

The 5th Circuit Court of Appeal affirmed the judgment of the District Court in a decision dated June 30, 1989.

An appeal being timely, this Honorable Court has jurisdiction, pursuant to 28 U.S.C., Section 1254(1).

A Notice of this appeal was filed in the United States Court of Appeal for the 5th Circuit on September 20, 1989.

## STATUTES AND REGULATIONS

1. 34 C.F.R. 674.49(e)

(e)Chapter 13 repayment plan.(1)The institution shall follow the procedures in this paragraph in response to a repayment plan proposed by a borrower who has filed for relief under Chapter 13 of the Bankruptcy Code.

(2)The institution is not required to respond to a proposed repayment plan if —

(1)The borrower proposes under the repayment plan to repay all principal, interest, late charges and collection costs on the loan; or

(11)The repayment plan makes no provision with regard either to the loan obligation or to general unsecured claims.

(3)(1)If the borrower proposes under the repayment plan to repay less than the total amount owed on the loan, the institution shall determine from its own records and court documents —

(A)The amount of the loan obligation dischargeable under the plan by deducting the total payments on the loan proposed under the plan from the total amount owed;

(B)Whether the plan or the classification of the loan obligation under the proposed plan meets the requirements of section 1325 of the Code; and

(C)Whether grounds exist under 11 U.S.C. 1307 to move for conversion or dismissal of the Chapter 13 case.

2. 11 U.S.C. 1328

(a)As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief

under this chapter, the court shall grant the debtor a discharge of all debts proveded for by the plan or disallowed under section 502 of this title, except any debt —

(1)provided for under section 1322(b)(5) of this title;

or

(2)of the kind specified in section 523(a)(5) of this title.

3. 11 U.S.C. 103(a)

(a) Except as provided in section 1161 of this title, chapters 1,3, and 5 of this title apply in a case under chapter 7, 11 or 13 of this title.

4. 11 U.S.C. 523(A)(8)

(a) A discharge under section 727, 1141 [.] 1228[a] 1228(b), or 1328(b) of this title [1] USCS section 724, 1141, 1228(a), 1228(b), or 1328(b) does not discharge an individual debtor from any debt . . .

(8) for an education loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non profit institution . . .

5. 11 U.S.C. 501(c)

(c) if a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

6. 11 U.S.C. 501 (Legislative History), Bankruptcy Code, Rules and Official Forms, 1989 Edition, The Lawyers Cooperative Publishing Company, Copyrite 1988, 1989

> . . .This subsection is permissive only, and does not require filing of a proof of claim by any creditor. It permits filing where some purpose would be served, such as where a claim that appears on a list, filed under proposed 11 USC 924 or 1111 was incorrectly stated or listed as disputed, . . .

## STATEMENT OF THE CASE

MICHAEL A. PRESTI made student loans to attend Tulane University pursuant to the Higher Education Act of 1965 — Part 13 of Subchapter IV of Chapter 28 of Title 20 of the United States Code. After said loans became due, MICHAEL A. PRESTI filed a Petition for Relief under Chapter 13 of the Bankruptcy Code on April 2, 1985, in the United States Bankruptcy Court, Eastern District of Louisiana. Therein, MICHAEL A. PRESTI scheduled THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND ("TULANE") as lender of an educational loan which was guaranteed by a governmental unit. The proper amount due was listed as undisputed and MICHAEL A. PRESTI proposed to repay 100% of said loan. The plan was confirmed by the Court on May 8, 1985. No creditors timely filed a proof of claim nor did the debtor or trustee file any. TULANE filed a proof of claim which was classified as untimely by the trustee. Further, the debtor did not file his own proof of claim to include in the plan his nondischargeable debt to TULANE. The trustee's Motion to Allow Claims provided to the debtor showed that no creditors filed any proffs of claim to be included in the plan. Consequently, no claims except for the debtor's attorney's fee were paid through the plan. The estate was closed on June 27, 1986, and $1,487.44, representing a tax refund seized by the trustee, was returned to the debtor. TULANE reopened the estate and on September 30, 1987, filed a Complaint to Determine Dischargeability of a debt, seeking to have its debt declared nondischargeable so that they may collect it outside of the bankruptcy. This was the first time that the issues made the subject of this appeal were raised. The Bankruptcy Court ruled that the debt was properly discharged.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NO.

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND

Petitioner,

V.

MICHAEL A. PRESTI and
LLOYD A. PIZZALOTO, SR., Trustee

Respondent.

## PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that a writ of certiorari issue herein to review the opinions of the United States Court of Appeal for the 5th Circuit. Those opinions concluded, *inter alla*, that because a proof of claim was not timely filed by the petitioner, that petitioner was properly barred from sharing in the proceeds of the confirmed chapter 13 bankruptcy plan, and that the debt owed petitioner, which was nondischargeable, pursuant to 11 U.S.C. 523(A)(8), was properly discharged by the United States Bankruptcy Court for the Eastern District of Louisiana.

The 5th Circuit Court of Appeal heavily relied on the precedent set in the case of *in Re Richards*, 50 B.R. 339, (E.D. Tenn. 1985).

In its opinion at Page 6, the 5th Circuit Court of Appeal stated:

> "*In Re Richards* [citations omitted] is a case completely analogous to the one before us. In *Richards* the bankruptcy court decided that where debtors had scheduled the IRS as a creditor, the IRS filed an untimely proof of claim, the debtors completed their payments under their chapter 13 plan, and were granted a discharge under section 1328(a), the IRS's claims were not nondischargeable. The bankruptcy court held that the IRS's claims had been discharged in the chapter 13 proceeding, even though the IRS had received no payments. This is exactly Presti's case. The only difference is that section 523(a)(1) was implicated in Richards, and section 523(A)(8) is implicated here. The two exceptions to discharge are parallel, and the same analysis clearly applies in the educational loan context."

A case with a similar factual basis is *In Re Tomlan*, 19 Collier B.R. Cases 783, (E.D. Wash. 1988). This case addressed the same issue as *In Re Richards*, supra, but is considerably more recent. At 791, the *Tomlan* Court held that:

> "This court is unable to reach the conclusion reached by other courts which have held that an untimely tax claim cannot participate in the plan, and must be discharged upon completion of the plan. *In Re Richards*,, 50 B.R. 339 (E.D. Tenn. 1985) . . .

The federal courts have issued conflicting decisions on this point which makes it necessary for this Honorable Court to review the instant case, pursuant to Supreme Court rule 17.1, and set a precedent that all federal courts will henceforth be bound to follow.

Additionally, it is suggested that this Honorable Court review the findings of the lower courts in this case to determine the intent of Congress when enacting the Legislation herein. The Court of Appeal interpreted the term "provided for" in 11 U.S.C. 1328 to mean mentioned in any way, even though a creditor may not receive any proceeds from the Chapter 13 bankruptcy plan. Tulane submits that had Congress intended nondischargeable creditors be treated as such it would not have gone to the trouble of enacting specific Legislation to give these creditors a nondischargeable status.

The subject law, as written, is confusing and conflicting, and provides a pitfall to a nondischargeable creditor that is unique in Chapter 13. A debtor can simply continue to file 100% repayment plan bankruptcies under Chapter 13, until the nondischargeable creditor errs and fails to file a timely proof of claim.

We suggest that this was not the intent of Congress, and that the current popular interpretation of the law is contrary not only to Congressional intent, but to its own orderly administration as well. The opinion of the 5th Circuit Court of Appeal, and the position of the debtor, are such that the statues herein are rendered inconsistent. If a nondischargeable creditor is listed as receiving 100% payment but receives nothing then such creditor is not really nondischargeable.

The contention is whether or not it is necessary for the nondischargeable creditor to file a proof of claim when he is scheduled in this manner in a Chapter 13 in order to preserve his claim. In a Chapter 11, a nondischargeable creditor need not file a proof of claim when he is so scheduled and will receive full repayment in the distribution. In a

Chapter 7, the nondischargeable creditor may simply ignore the proceeding and collect outside of the bankruptcy in civil court; the debtor, however has the option of forcing the nondischargeable creditor into the Chapter 7 distribution by filing said creditor's proof of claim for him. Should the Chapter 7 distribution be insufficient to cover the total debt owed, then the nondischargeable creditor is free to collect the balance in civil court.

The opinion of the 5th Circuit Court of Appeal is contrary to this established law of Chapters 7 and 11. It creates the pitfall for the nondischargeable creditor that is unique to the Chapter 13, pursuant to their current ruling. While conceding that this unique pitfall is created, the 5th Circuit Court of Appeal justified their ruling by reciting the established principle that the Chapter 13 provides the debtor greater advantages than the Chapters 7 and 11.

This position, however, is disingenuous. Congress did intend the Chapter 13 debtors more benefits than those in Chapters 7 and 11, but not in the manner that the 5th Circuit Court of Appeal is holding. The *Tomlan* case, cited supra, discussed this inappropriate application of the liberal provisions of Chapter 13 in greater length. Further, the current 5th Circuit Court of Appeal holding renders Sections 523, 501 and 1328 of Title 11 of the United States Code inconsistent with each other. Section 523 says that federally guaranteed student loans must be repaid. The 5th Circuit Court of Appeal's interpretation of Section 1328, however, says they do not have to be repaid in a Chapter 13, unlike all other Chapters of Title 11. By so holding, they render Section 501(C) meaningless as it is the vehicle for a Chapter 13 debtor to protect himself from nondischargeable creditors.

Should this Honorable court adopt Tulane's position,

it will keep these statutes consistent with each other, and Chapter 13's treatment of nondischargeable creditors consistent with Chapters 7 and 11. The Chapter 13 debtor would simply have to avail himself of the advantages of 11 U.S.C. 501(C), as does the Chapter 7 debtor. The most liberal provisions of Chapter 11 require that the nondischargeable creditors will automatically be paid both within and outside of the proceedings without anyone having to do anything unless the debtor disputes the debt. This unique pitfall created by the 5th Circuit Court of Appeal is not one of the "benefits" of a Chapter 13 bankruptcy intended by Congress, as this Honorable Court will hopefully consider.

Petitioners, The Administrators of the Tulane Educational Fund, pray that this Honorable Court issue a writ of certiorari herein to review the decision of the United States Court of Appeal for the 5th Circuit, which affirmed the ruling of the United States Bankruptcy Court for the Eastern District of Louisiana dated April 14, 1988.

Respectfully submitted,

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(504) 254-5297

## CERTIFICATE OF SERVICE

Undersigned counsel for petitioner hereby certifies that he has on the 26th day of September, 1989, served a copy of the foregoing petition for writ of certiorari on counsel for all parties to this proceeding, including Mr. Michael F. Adoue, attorney for respondents, and Lloyd A. Pizzaloto, Sr., United States Trustee, by mailing the same by United States Mail, properly addressed, and first class postage prepaid.

KATHLEEN M. BILBE

# APPENDIX A

## UNITED STATES BANKRUPTCY COURT
## EASTERN DISTRICT OF LOUISIANA
## NEW ORLEANS

| | | |
|---|---|---|
| THE MATTER OF: | * | |
| | * | |
| | * | |
| MICHAEL A. PRESTI | * | No. 87-0326 |
| | * | |
| Debtor | * | |
| | * | |
| * * * * * * * * * * * | * | |

Transcript of proceedings held in the above-captioned matter on Tuesday, August 2, 1988, the Honorable Thomas M. Brahney, III, United States Bankruptcy Judge, presiding.

**APPEARANCES:**

MICHAEL F. ADOUE, Esquire
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New Orleans, Louisiana

Representing the Debtor

KATHLEEN BILBE, Esquire
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New Orleans, Louisiana 70129

Representing Tulane University

AUDIO OPERATOR: Patricia Russo

TRANSCRIPT PREPARED BY: CAS TRANSCRIPTS
1209 Eisenhower Avenue
Metairie, Louisiana 70003
(504) 733-8084

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

## PROCEEDINGS

THE COURT: Hearing in the Presti matter, 87-0326.

MR. ADOUE: Your Honor, Michael Adoue on behalf of Mike Prestsi.

MS. BILBE: Good morning, Judge Brahney, Kathy Bilbe here on behalf of Tulane University.

In April of this year, Judge, you issued a judgment in favor of the debtor stating that his student loan was discharged in a Chapter 13. Although no payments were made to the creditor, the proof of claim was not filed by the university.

I have submitted for your consideration, Judge Brahney, a section of the Federal Register that is effective as of February 2nd of this year, and what it is it is uniform regulations for the lending institutions to follow with regard to collecting their debts that are made to students. And there is a pertinent section which I've cited in my supplemental memorandum which is Title 34 of the Federal Register, 674.49E effective February of this year that says that if the - let's see.

THE COURT: February of this year?

MS. BILBE: Yes, sir.

THE COURT: This is an 85 case.

MS. BILBE: Well, I have —

THE COURT: Or an 87 case.

MS. BILBE: I don't know if —

THE COURT: No.

MS. BILBE: — Your Honor —

MR. ADOUE: Bankruptcy case numbered 85.

THE COURT: It's a '85 case so that rule cannot apply to this case.

MS. BILBE: Well, I would submit that it does, Your Honor. And it says that if a hundred percent plan is proposed by the debtor, then the institution need not respond to the proposed payment plan. And I would suggest that this —

THE COURT: Well, I suggest that you tell them since you're their attorney, give them some legal advice and tell them that their rules have no effect on this Court. This Court is controlled by the Bankruptcy Code and Bankruptcy Rules, not by any rules or regulations of the lending institutions for educational loans.

MS. BILBE: Well, I understand, Your Honor. However, there is a case *In re Hanson*, 47 Bankruptcy

Reporter 47, that dealt with the Public Health Service Act giving precedence over the bankruptcy section with regard to the HEAL loans, health, education assistance loans and that court held that —

THE COURT: Well, this Court will stand on its prior ruling and your motion for new trial is denied. If you get me reversed, let them tell me I'm wrong.

MS. BILBE: Thank you, Judge.

THE COURT: You're welcome.

* * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Carolyn Springman — September 11, 1988

CAROLYN SPRINGMAN

## APPENDIX B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

| THE MATTER OF: | BANKRUPTCY NUMBER |
|---|---|
| MICHAEL A. PRESTI<br>Debtor | 85-00686 |
| THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND<br>Plaintiff | ADVERSARY NUMBER<br>87-0326 |
| versus | |
| MICHAEL A. PRESTI and LLOYD A. PIZZALOTO, SR.<br>Defendants | CHAPTER 13 |

### FINDINGS OF FACT
### CONCLUSIONS OF LAW

This matter came before the Court on a Complaint To Determine Dischargeability Of A Debt filed by The Administrators of the Tulane Educational Fund (Tulane). The matter was submitted to the Court on memoranda filed by the parties. After reviewing the entire record of this proceeding and the memoranda of counsel, the Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Michael A. Presti filed for relief under Chapter 13 of the Bankruptcy Code on April 2, 1985.

2. Mr. Presti listed the Administrators of the Tulane Educational Fund as a creditor in his schedules.

3. The Debtor proposed to pay one hundred (100%) percent of his debts through his Chapter 13 plan. The plan was confirmed by the Court on May 8, 1985.

4. The cut off date for filing Proofs of Claim was August 6, 1985. It is undisputed that Tulane received the notice of the meeting of creditors and knew of the cut off date.

5. Tulane failed to timely file a Proof of Claim. Proofs of Claim were filed by Tulane on September 10, 1985 and May 21, 1986. The Trustee classified them as untimely.

6. Having completed the payments under the plan the Debtor was granted a discharge on May 21, 1986.

7. Debtor's estate was closed on June 27, 1986 and $1,487.44 was returned to the Debtor.

8. On September 30, 1987, Tulane filed a Motion To Re-open Estate. Said motion was granted and Tulane subsequently filed the instant complaint.

## CONCLUSIONS OF LAW

1. Tulane cites 11 U.S.C. §523(a)(8) in support of its argument that it should be held to be non-dischargeable. That section provides:

> (a) A discharge under section 727, 1141 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (8) for an educational loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution, ...

2. Tulane's reliance on this section is misplaced. The Debtor was not granted a discharge under either section 727, 1141, 1228(a), 1228(b) or 1328(b). Thus, §523(a)(8) is not applicable in the instant matter.

3. Debtor's discharge was granted under §1328(a) which provides:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharges executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt —
>
> (1) provided for under section 1322(b)(5) of this title; or
> (2) of the kind specified in section 523(a)(5) of this title.

Tulane's debt is not of the kind provided for under §1325(b)(5) or §523(a)(5). Therefore, the discharge affects Tulane's debt.

4. *Collier* states:

"The discharge available in Chapter 13 is broader than the Chapter 7 discharge in that certain debts not dischargeable in Chapter 7 are dischargeable in Chapter 13... Most educational loans not dischargeable in Chapter 7 may also be discharged. ..." 5 *Collier on bankruptcy,* §1328.01(c) at 1328-3 (15th ed. 1987).

5. Bankruptcy Rule 3002 requires that an unsecured creditor must file a proof of claim in order for that claim to be allowed. The Court is of the opinion that Tulane is incorrect in its contention that §501 requires that a Debtor must file a proof of claim if a creditor fails to timely do so.

6. "... the fact that a creditor is not paid because it failed to file a claim when given the opportunity to do so had no relevance to the dischargeability of the debt. As long as the plan contains some provision describing the treatment of that debt, and no exception to the Chapter 13 discharge applies, the debt is discharged." 5 *Collier on Bankruptcy,* §1328.01(d)(i) at 1328-6 (15th ed. 1987).

7. The Debtor properly listed Tulane as a creditor in his schedules and proposed to pay the debt in full under his Chapter 13 plan. Tulane received notice of the bankruptcy and failed to timely file a proof of claim in order to be paid under the plan. Having completed the payments required under the plan, the Debtor received a discharge. Tulane cannot now come in and have its debt declared non-dischargeable.

Accordingly, the Court will enter a Judgment dismissing Plaintiff's complaint.

New Orleans, Louisiana, April 14, 1988.

signed: T. M. Brahney, III
T. M. Brahney, III
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

| THE MATTER OF: | BANKRUPTCY NUMBER |
|---|---|
| MICHAEL A. PRESTI<br>Debtor | 85-00686 |
| THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND<br>Plaintiff | ADVERSARY NUMBER<br>87-0326 |
| versus | |
| MICHAEL A. PRESTI and LLOYD A. PIZZALOTO, SR.<br>Defendants | CHAPTER 13 |

**JUDGMENT**

For the reasons assigned in the attached Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that the Complaint To Determine Dischargeability of a Debt filed by The administrators of The Tulane Educational Fund be, and it is hereby, DISMISSED.

New Orleans, Louisiana, April 14, 1988.

Signed: T. M. Brahney, III

T. M. Brahney, III
U. S. Bankruptcy Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
NOV 22 1988

| | | |
|---|---|---|
| IN THE MATTER OF | * | CIVIL ACTION |
| MICHAEL ANTHONY PRESTI, | * | No. 88-4184 |
| DEBTOR, ET AL | * | SECTION "D" (3) |

### OPINION AND ORDER

Before the court is the Petition of Appellants, The Administrators of Tulane Educational Fund, for Appeal from Final Judgment of the U. S. Bankruptcy Court for the Eastern District of Louisiana. Appellee, Michael A. Presti, responds.

### I. FACTS

On November 16, 1984, the Administrators of the Tulane Educational Fund (Tulane) sued Michael A. Presti in state court, seeking recovery of $7,300.00, plus interest, cost and attorney fees related to a National Direct Student Loan. Consequently, on April 2, 1985, Mr. Presti filed a voluntary Petition in Bankruptcy under Chapter 13 of the Bankruptcy Code. In his Chapter 13 plan, Mr. Presti included Tulane in his lists of unsecured creditors and proposed to pay 100% of the debt owed to his creditors.

Nov. 28 1988
DATE OF ENTRY

On April 12, 1985, the Clerk of Bankruptcy Court mailed a notice[1] to the creditors of Mr. Presti's estate, stating that a creditors' meeting was scheduled for May 8, 1985. Furthermore, the notice instructed that:

> In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the debtor. Claims not filed by *August 6, 1985*, will not be allowed, except as otherwise provided by law. (emphaasis added).

It is undisputed that Tulane received this notice, and Tulane filed no objections. Following the creditors' meeting on May 8, 1985, the Bankruptcy Court confirmed Mr. Presti's plan. Because Tulane did not file proof of claim until September 10, 1985 and May 21, 1986[2] the trustee classified them as untimely.

Mr. Presti completed payments under the plan and was granted a discharge on May 21, 1986. His estate was closed on June 27, 1986.

On September 30, 1987, Tulane was granted a Motion to Reopen the Estate. Tulane subsequently filed a Complaint to determine dischargeability of a debt. On April 14, 1988, the Bankruptcy Court dismissed this Complaint. *In Re Presti*, 1988 Bankr. LEXIS 750 (April 14, 1988).

---

[1] This notice was sent to the creditors in accordance with Bankruptcy Rule 3002, discussed *infra*, pp. 3-4.

[2] Additionally, neither Mr. Presti nor the trustee filed a proof of claim for Tulane

Tulane now appeals this dismissal, seeking to have Mr. Presti's student loan debt declared non-dischargeable so that Tulane may collect the debt outside of Bankruptcy, in State Court. On Appeal, Tulane argues that:

(A) Tulane was not requird to file a proof of claim;

(B) The court erred in its finding that: (1) the debtor completed all payments required by the plan; and (2) the debtor was discharged from all debts provided by the plan; and

(C) The debtor should have filed a proof of claim for Tulane.

## II. LEGAL DISCUSSION

Having considered the record, briefs of counsel and the applicable law, the court finds that Tulane's arguments on appeal are without merit.

A. *Tulane Was Required To File A Proof Of Claim.*

The purpose of Chapter 13 is to grant an individual with regular income a fresh start through extension and composition plans, funded out of future income. 5 Collier on Bankruptcy, 1300.12 (15th ed. 1986). For a Chapter 13 plan to be successful and for the debtor to get his frest [sic] start, the debtor and trustee must know what claims must be paid.

To determine what claims must be paid, Bankruptcy Rule 3002 requires that an unsecured creditor file a proof of claim if the claim is to be allowed. In a Chapter 13 individual's debt adjustment case, Bankruptcy Rule 3002(c) requires that the proof of claim be filed within 90 days after

the first date set for the meeting of the creditors[3], with certain exceptions not applicable here.

If a creditor fails to timely file a proof of claim, that creditor is unable to participate in the debtor's Chapter 13 plant. *Wilken v. Simon Brothers, Inc.*, 731 F.2d 462 (7th Cir. 1984). Therefore, because Tulane failed to timely file its proof of claim, as required by Bankruptcy Rule 3002, Tulane's claim must be disallowed.

In arguing that Tulane was not required to file a proof of claim, Tulane cites the following portion of 34 C.F.R. 674.49(e):

> (e) *Chapter 13 repayment plan.* (1) the institution shall follow the procedures in this paragraph in response to a repayment plan proposed by a borrower who has filed for relief under Chapter 13 of the Bankruptcy Code.
>
> (2) The institution is not required to respond to a proposed repayment plan if —
>
> (i) The borrower proposes under the repayment plan to repay all principal, interests, lay charges and collection cost on the loan . . . .

---

[3] The concept of requiring creditors to file a proof of claim within a certain period of time (the "bar date") stems from the Bankruptcy Act of 1898. Prior to that time, there was no fixed time period for filing claims. In order to facilitate the prompt administration of the bankrupt's (now the debor's) estate, a one-year limitation period was set which was later reduced to six months by the Chandler Act of 1938, which was further reduced to three months by Bankruptcy Rule 3002(c). Therefore, the trend has been toward requiring creditors to assert their claims ever more quickly.

However, Tulane completely ignores 34 C.F.R. 674.49(b) which states:

> (b) *Proof of Claim. The institution shall file a proof of claim* in the Bankruptcy proceeding, unless, in the case of a proceeding under Chapter 7 of the Bankruptcy Code, the notice of the meeting of creditors states that the borrower has no assets. Therefore, like Bankruptcy Rule 3002, 34 C.F.R. 674.49 requires the creditor to file a proof of claim. (emphasis added).

Tulane's reliance on 34 C.F.R. 674.49(e) is therefore misplaced.[4]

B. *Because The Debtor Completed All Payments Required By The Plan, He was Discharged from All Debts.*

To encourage debtors to use Chapter 13 of the Bankruptcy Code and thus provide some payment to creditors, Congress affords Chapter 13 debtors a much broader discharge than is available under other Chapters of the Code. For example, most educational loans not dischargeable in Chapter 7 are dischargeable in Chapter 13. 5 Collier on Bankruptcy, 1328.01(c) (15th ed. 1987); *In Re Estus,* 695 F.2d 311 (8th Cir. 1982).

In the instant case, the Bankruptcy Court discharged Mr. Presti of all debts pursuant to 11 U.S.C. 1328(a). In pertinent part, 11 U.S.C. 1328(a) provides that:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the

---

[4] This conclusion obviates the need to address: (1) whether 34 C.F.R. 674.49(e) is applicable to the instant case considering its effective date of February 3, 1988; and (2) whether this regulation supersedes the Bankruptcy Statutes as Tulane contends.

> executed by the debtor after the order for relief under this Chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under Section 502 of this title, except any debt—
>
> (1) Provide for under Section 1322(b)(5) of this title [longterm debt]; or
>
> (2) Of the kind specified in Section 523(a)(5) of this title [alimony and support].

The bankruptcy Court concluded that because Tulane's debt did not fall under the exceptions of 1328(a), Tulane's debt was discharged. Tulane, however, would have this court interpret Section 1328(a) as including an additional exception to discharge "those debts for which a proof of claim has not been timely filed." The court finds that such an interpretation would be contrary to the clear language of the statute.

This court concludes that Mr. Presti completed his obligations under the plan because Tulane's failure to timely file a proof of claim terminated his obligation to make payments to Tulane under his plan. In other words, because Tulane's claim was disallowed, the trustee could not distribute payments to Tulane. Therefore, Mr. Presti was entitled to a discharge of all debts, including the Tulane school loan debt, provided by the plan.

Tulane also argues that its claim is not dischargeable under 11 U.S.C. 523(a)(8) which provides that:

> (a) a discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of a Title 11 does not discharge an individual debtor from any debt . . . .

> (8) for an educational loan made, insured, or guarantee by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution . . . .

Again, Tulane's argument is unfounded because Mr. Presti's discharge was under Section 1328(a), which is not a section making 11 U.S.C. 523(a)(8) operative.

C. *The Debtor Was Not Required To File A Proof Of Claim for Tulane.*

11 U.S.C. 501(c) provides that:

> If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of claim. (emphasis added).

Tulane argues that since Tulane did not not file its proof of claim by the cut off date, the debtor should have filed a proof of claim on Tulane's behalf. To support this argument, Tulane cites the following legislative history of 11 U.S.C. 501:

> In liquidation and individual repayment plan cases, the trustee or the debtor may file a proof of claim if the creditor does not timely file. The purpose of this subsection is mainly ro protect the debtor if the creditor's does not file, there would be no distribution on the claim, and the debtor would have a greater debt to repay after the case is closed than if the claim were paid in part or in full in the case or under the plan. . . . (emphasis added).

However, because the court finds that Tulane's claim is *dischargeable,* the court concludes that Tulane's reliance on Section 501(c) and its legislative history is misplaced.

## III. CONCLUSION

For the reasons set forth above, the court affirms the judgment of the Bankruptcy Court, dismissing Tulane's Complaint to determine dischargeablity of a dept.

New Orleans, Louisiana, this 21 day of November, 1988.

/s/ illegible

UNITED STATES DISTRICT JUDGE

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3927

IN THE MATTER OF: MICHAEL ANTHONY PRESTI,
Debtor.

THE ADMINISTRATORS OF
THE TULANE
EDUCATIONAL FUND

Appellant,

versus

MICHAEL A. PRESTI and
LLOYD A. PIZZALOTO, SR., Trustee

Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(88-4184-D)

( June 30, 1986 )

Before GEE, REAVLEY, and JOLLY, Circuit Judges.

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion Should not be published.

The administrators of the Tulane Educational Fund ("Tulane") appeal from an order of the district court, affirming the bankruptcy court's holding that Tulane was entitled to recover nothing on its education loan to Michael Presti, because Tulane had failed to file a timely proof of claim in Presti's chapter 13 bankruptcy proceeding. We affirm.

I

Michael Presti failed to pay back a National Direct Student Loan ("NDSL") he owed Tulane. Tulane sued him in district court for $7,300 plus interest, costs and attorney's fees, and on April 2, 1985, Presti filed a petition for relief under Chapter 13 of the Bankruptcy Code. The petition listed the Tulane Educational Fund as an unsecured creditor. Tulane received notice of the filing, and of the creditors' meeting to be held on May 8, 1985. Tulane never filed a timely proof of claim, and never objected to Presti's proposed plan which provided for payment of 100% of all allowed unsecured claims.

Presti made payments under the plan, and was discharged in bankruptcy on May 21, 1986. According to Tulane, because no creditors filed proofs of claim, the only payment Presti was required to make through the plan was his attorney's fee.

Tulane then filed a complaint in bankruptcy court to Determine the Dischargeability of Debt, requesting that the court declare Presti's student loan nondischargeable so that Tulane could attempt to collect on that loan through a state court proceeding. The bankruptcy court held that because Tulane had not filed a proof of claim, it could not now ask to have its debt declared nondischargeable.

On April 25, 1988, Tulane filed a motion for new trial, which was denied on August 2, 1988. Tulane then filed a complaint in district court seeking review of the bankruptcy court ruling.

The district court affirmed, concluding that Tulane was required to file a proof of claim; Presti had satisfied his responsibility under the plan and was therefore discharged from all debts; and Presti was never required to file a proof of claim on Tulane's behalf.

On appeal, Tulane urges that it is a nondischargeable creditor, and requiring a nondischargeable creditor to file a proof of claim when it has already been scheduled to be repaid in full by the debtor, creates a "pitfall unique" to chapter 13.

II

Presti's NDSL was not nondischargeable in his chapter 13 bankruptcy proceeding. Bankruptcy Code § 523(a) states in part:

> § 523 *Exceptions to Discharge*
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> (1) for a tax or customs duty--
> . . . .
> (8) for an educational loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless--
> (A) such loan first became due before five years (exclusive of any applicable suspen-

> sion of the repayment period) before the date of the filing of the petition; or
> (B) expecting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Presti's educational loan is nondischargeable under section 523(a)(8) only if (1) his debts were discharged under section 1328(b), and (2) his loan first became due less than five years before he filed his petition in bankruptcy.

The bankruptcy court found that Presti's NDSL was not nondischargeable under section 523(a) because his chapter 13 discharge was not under section 1328(b), but under section 1328(a). Section 1328 reads as follows:

> § 1328. *Discharge.*
>
> (a) As soon as practicable after *completion* by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, *the court shall grant the debtor a discharge of all debts provided for by plan* or disallowed under section 502 of this title, *except any debt*--
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title [pertaining to alimony, maintenance, support]
>
> (b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has *not completed* payments under the plan only if--

> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justify be held accountable;
>
> (2) the value . . . of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable.
>
> (c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of a kind specified in section 523(a) of the this title.

(Emphasis added.)

Presti completed his payments under the plan, which puts his discharge under section 1328(a) rather under section 1328(b). His loan is therefore dischargeable. *See Matter of Johnson*, 787 F.2d 1179 (7th Cir. 1986) (educational loans are generally discharged under chapter 13); *In re Syrus*, 12 Bankr 605 (D.Kan. 1981). *Compare, In re Goodwin*, 58 Bankr. 75 (D. Me. 1986).

Tulane argues that Presti did not complete payments under the plan, because he never made payments to Tulane. This is a flawed argument: Presti's proposed plan provided for payment of 100% of all allowed unsecured claims. An unsecured creditor must file a proof of claim within ninety

days after the first date set for the meeting of creditors, in order for its claim to be allowed under the debtor's plan. Bankruptcy Rule 3002. Tulane did not file a timely proof of claim, so its claim was not an allowed unsecured claim for the purposes of Presti's plan.

Tulane contends then that its debt was not "provided for by the plan," since no proof of claim was filed; therefore the language of section 1328(a) does not excuse the debtor from paying back that debt. This argument has been heard and rejected. *See Goodwin, supra; Collier on Bankruptcy,* 15th ed., ¶ 1328.01[1][d][i] at 1328-6 states in part:

> The Code does not specifically define "provided for,"and some creditors have argued that if a plan does not propose to make payments on a debt it does not provide for that debt. This argument was properly rejected by the Court of Appeals for the Ninth Circuit in *Lawrence Tractor Co. v. Gregory (In the Matter of Gregory),* which held that to "provide for" a claim a plan need only "make a provision for it, i.e., deal with it or refer to it." Even if the plan proposes to pay nothing to unsecured claimants, if those claimants have proper notice and an opportunity to object to confirmation their claim may be discharged under section 1328(a).

*Id.*

*In re Richards,* 50 Bankr. 399 (E.D. Tenn. 1985), is a case completely analogous to the one before us. In *Richards* the bankruptcy court decided that where debtors had scheduled the IRS as a creditor, the IRS filed an untimely proof of claim, the debtors completed their payments under their chapter 13 plan, and were granted a discharge under

section 1328(a), the IRS's claims were not nondischargeable. The bankruptcy court held that the IRS's claims had been discharged in the chapter 13 proceeding, even though the IRS had received no payments. This is exactly Presti's case. The only difference is that section 523(a)(1) was implicated in *Richards*, and section 523(a)(8) is implicated here. The two exceptions to discharge are parallel (*see* section II above citing section 523(a)), and the same analysis clearly applies in the educational loan context.

Tulane further complains that requiring a creditor to file a proof of claim when the debtor has scheduled the creditor to be paid back in full, creates "a pitfall unique to a Chapter 13 [which] does not exist in Chapters 7, 11 and 12 of the Bankruptcy Code and is not the intent of the Congress." It is widely recognized, however, that the discharge provisions of chapter 13 (Adjustment of Debts) are broader than those of other chapters, and suggested that this reflects a policy judgment that it is preferable to encourage debtors to repay their debts to the best of their abilities over the three-year period provided in chapter 13, than to leave them with some debts hanging over their heads indefinitely. *Collier*, ¶ 1328.01[1][c] at 1328-4, 1328-5.

Tulane's final argument is that the same reasoning allowing for the nondischargeability of Health Education Assistance loans in cases such as *Matter of Johnson*, 787 F.2d 1179 (7th Cir. 1986), should apply to NDSLs after the Higher Education Act of 1965. There is absolutely no support for this argument. The legislative framework discussed in *Matter of Johnson* is completely distinguishable from that implicated in the instant case.

## III

Presti completed all his payments under his chapter

13 and earned himself a discharge of all debts under section 1328(a). Because Tulane had an opportunity to file a proof of claim in Presti's chapter 13 proceeding but did not, it now has no remedy against Presti. *See Goodwin*, ("The IRS would have the court rule that upon completion of the debtor's plan it may pursue the debtors on its claim. . . . It requires but little imagination to realize that such interpretation would quickly mean death to Chapter 13"). For the foregoing reasons, the judgment of the district court is

AFFIRMED.